

## **DUE PROCESS IN IMMIGRATION PROCEEDINGS**

### **I. DUE PROCESS**

#### **A. Right to a Full and Fair Hearing**

The Fifth Amendment guarantees due process in deportation proceedings. *See Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999). An applicant for asylum is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf. *Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002). This court reviews de novo, and will reverse on due process grounds if the proceeding was “so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (internal quotation omitted).

#### **B. Prejudice Requirement**

In addition to showing a due process violation, an applicant must also show prejudice. *Cano-Merida v. INS*, 311 F.3d 960, 965 (9th Cir. 2002). Prejudice can be shown where “the IJ’s conduct potentially affected the outcome of the proceedings.” *Id.* (internal quotations and punctuation omitted). An applicant “need not explain exactly what evidence he would have presented in support of his application, and we may infer prejudice in the absence of any specific allegation as to what evidence [the applicant] would have presented.” *Id.* (internal quotations and citation omitted); *see also Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000).

#### **C. Exhaustion Requirement**

Exhaustion is generally required. *See Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000). However, an applicant may raise a constitutional issue directly with the court of appeals, unless it is a due process claim which alleges a procedural error correctable by the BIA. *See Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995). Exhaustion is not required where it would be “futile or impossible.” *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003) ,

## D. Examples

### 1. Right to a Neutral Fact-Finder

This court has found a due process violation where the IJ pressured an asylum applicant to withdraw his application and to accept voluntary departure, without giving him an opportunity to present oral testimony at the hearing. *Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002); *see also Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (finding due process violation where “the IJ behaved not as a neutral fact-finder interested in hearing the petitioner’s evidence, but as a partisan adjudicator seeking to intimidate Colmenar and his counsel”); *Reyes-Melendez v. INS*, No. 02-70526, 2003 WL 22053448 (9th Cir. Sept. 4, 2003) (finding due process violation in suspension case where IJ was aggressive, snide, and accused applicant of moral impropriety); *cf. Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003) (rejecting due process claim based on the IJ’s aggressive and harsh questioning).

The court has directed that a case be reassigned to a new IJ’s upon remand where the IJ’s comments during the hearing and in his oral decision were “highly caustic and without substance.” *Nuru v. Gonzales*, 404 F.3d 1207, 1229 (9th Cir. 2005).

### 2. Exclusion of Evidence

The IJ’s exclusion of proffered evidence may result in a due process violation. *See Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (remanding for clarification of applicant’s due process claims based on the exclusion of two documents).

### 3. New Country of Deportation

The IJ’s last minute switch of the country of deportation violates due process because lack of proper notice. *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999).

#### 4. Right to Translation

“Due process requires that an applicant be given competent translation services” if he or she does not speak English. *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003); *see also Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000). “In order to make out a due process violation, . . . the alien must show that a better translation would have made a difference in the outcome of the hearing.” *Kotas v. INS*, 31 F.3d 847, 850 n.2 (9th Cir. 1994) (internal quotation omitted).

#### 5. Right to File Brief

The BIA’s refusal to allow an applicant to file a brief violated his due process rights. *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. Aug. 15, 2003).

#### 6. Ineffective Assistance of Counsel

Due process claims based on ineffective assistance of counsel must generally comply with the requirements set forth in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1071-72 (9th Cir. 2003). The applicant must: “(1) provide an affidavit describing in detail the agreement with counsel; (2) inform counsel of the allegations and afford counsel an opportunity to respond; and (3) report whether a complaint of ethical or legal violations has been filed, and if not, why.” *Id.* This court has held that noncompliance will be excused where the “facts are plain on the face of the administrative record.” *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000).

For more information on ineffective assistance of counsel claims, *see* *Motions to Reopen or Reconsider Immigration Proceedings*.